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No. 00-1912

IN THE

Supreme Court of the United States

TDY INDUSTRIES, INC.,

Petitioner,

v.

KAISER AEROSPACE AND ELECTRONICS CORPORATION and PAQ, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question framed in the petition for writ of certiorari (the "Petition") does not fairly correspond to any issue in this case, among other reasons, because:

- The state court litigation which Teledyne would enjoin *had already commenced* before the plan of reorganization (that was ultimately confirmed) had even been filed (the Petition erroneously refers to the "*subsequent* litigation" in state court) (Pet. at *i*; emphasis added);

- A judgment for Kaiser in the state court would *not* "contradict" any "elements of the reorganization plan," *id.*, inasmuch as it would result in either (a) a money judgment against shareholders of the company which acquired the assets of the debtor under the plan, or (b) the imposition of a constructive trust over a portion of their stock, leaving untouched that company's obligations to former creditors (all of which have long been discharged, in any event).[1]

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1. As the Eleventh Circuit opinion accurately states: "[W]hat Kaiser seeks in the state court suit is not the defeat of the [bankruptcy reorganization] plan, but rather ownership rights in the post-reorganization entity, or damages equal to the profits and benefits that it would receive if it had such ownership rights." Pet. App. A at 32a. As is clear from the record below, neither form of relief was dealt with by the plan of reorganization, or even raised at the confirmation hearing.

The more fairly stated question presented here is:

> Whether, under the doctrine of *res judicata*, a final bankruptcy court judgment confirming a plan of reorganization precludes the litigation of a previously filed state court contract dispute, not involving the debtor, where none of the issues presented in the state court action were adjudicated or even raised in the confirmation proceeding, and where the ultimate outcome of the state court action would not affect the confirmed plan.

CORPORATE DISCLOSURE

Respondent Kaiser Aerospace and Electronics Corporation ("KAEC") is a wholly owned subsidiary of Rockwell Collins, which is a publicly held company. Respondent PAQ, Inc. (formerly PIC, Inc.) has merged with KAEC. KAEC and PAQ, Inc. are collectively referred to herein as "Kaiser".

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure	iii
Table of Contents	iv
Table of Cited Authorities	v
Statement of the Case	1
Reasons for Denying the Writ	4
A. There is No Inter-Circuit Conflict	4
B. This Case Would Provide a Decidedly Inappropriate Vehicle for the Court to Speak Out on *Res Judicata* Issues in Bankruptcy	9
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) 5

CoreStates Bank, N.A. v. Huls America, Inc., 176 F.3d 187 (3d Cir. 1999) 5, 6, 7, 8

Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330 (3d Cir. 2000) 7, 8

Iannochino v. Rodolakis (In re Iannochino), 242 F.3d 36 (1st Cir. 2001) 8

Katchen v. Landy, 382 U.S. 323 (1966) 5

Prudence Realization Corp. v. Ferris, 323 U.S. 650 (1945) 5

Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th Cir. 1997) 8

Stoll v. Gottlieb, 305 U.S. 165 (1938) 5

Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544 (11th Cir. 1990) 5, 6

Rule:

Sup. Ct. R. 10 5

STATEMENT OF THE CASE

Because Kaiser believes that the Petition has, in several material respects, inaccurately set forth or omitted key facts bearing upon issues properly before the Court if certiorari were granted, we point out those errors here.

The key elements of the November 4, 1994 Cooperation Agreement (the "Cooperation Agreement") which form the basis for the contract claim in the underlying state court action are its express provisions prohibiting either party: (1) from withdrawing from or ceasing to act as a proponent of the parties' joint plan; and (2) from terminating their agreement without the consent of the other. Because Teledyne (Piper's largest creditor), the Debtor and the Creditors' Committee were the only parties permitted to file a plan, it was essential to the viability of the Cooperation Agreement that Teledyne be prohibited from doing exactly what it ultimately did here: i.e., from unilaterally abandoning Kaiser, whose access to the bankruptcy was only through Teledyne, in favor of another partner willing to give Teledyne better terms. These contractual prohibitions (ignored in the Petition) were the essential purpose of the Cooperation Agreement.

In the Piper reorganization case, the Kaiser-Teledyne plan was competing against the Debtor-Committee plan. Because further competition between the proponents of these parallel-tracked plans would create uncertainty and risk to the competing groups, the competing parties negotiated what was, in effect, a settlement — a "consensual plan" among all four parties, Kaiser, Teledyne, Debtor and Committee, that would displace the competing plans and send a single, joint consensual plan directly to confirmation.

That is exactly what happened, except that after the four parties all agreed in principle on the details of the consensual plan, Teledyne decided it wanted a larger share of the entity buying the Debtor's assets, kicked out Kaiser, and substituted DS&P, which was willing to contribute the same amount of money, but leave Teledyne with a greater stake in the acquiring entity.

Kaiser's only protection against this eventuality was the Cooperation Agreement's prohibition against unilateral termination, because for the consensual plan to work, the competing plan proponents had to mutually abandon their competing plans for the consensual one. Contractually, the abandonment of the original Kaiser-Teledyne plan required Kaiser's agreement, which was implicit in its successful negotiation of the consensual plan.

Thus, when Teledyne informed Kaiser that Teledyne was proceeding with the consensual plan without Kaiser, Kaiser protested, responding that Teledyne could not do so, and that if Teledyne was unwilling to stick with the terms of the consensual deal between Kaiser and Teledyne as previously understood and agreed, then Kaiser would hold Teledyne to the original competing plan under the Cooperation Agreement. Teledyne's refusal formed the basis for the claim for breach of contract in the state court action. Kaiser also filed tort claims against Teledyne and DS&P for what was, in effect, the theft of the benefit of Kaiser's negotiated consensual deal.

Kaiser did not sue because it was the "unsuccessful proponent of a rejected plan." Pet. at *i*. To the contrary, Kaiser was an original co-proponent of the four-party consensual plan that was ultimately confirmed (although Kaiser was

involuntarily excluded at the last moment). This explains why Kaiser did not object to confirmation, because this was the identical plan that Kaiser would have been promoting but for Teledyne's unilateral displacing of Kaiser from the deal.

The confirmed plan, thus, was not the "DS&P Plan" as Teledyne characterizes it, Pet. at 2, but in reality the Kaiser plan, and as Kaiser alleged in its state court complaint, the Creditors' Committee voted to accept it by looking at the last form of agreement with *Kaiser*, based upon the representation of Committee counsel that the terms were the same. When Teledyne brought DS&P in, the deal was already done, negotiated by Teledyne with Kaiser's money. DS&P simply intervened at the end and, in effect, just substituted its check for Kaiser's.

Finally, and of critical importance, the allegedly "extensive" confirmation hearing, Pet. at 3, *did not involve any adjudication of Kaiser's claims* against Teledyne and DS&P, which were never raised. Indeed, Teledyne did not even inform the bankruptcy court of the pendency of the previously filed Kaiser state court action. Further, the bankruptcy court did not "award" New Piper stock to Teledyne and DS&P, Pet. at 4; it was in no position to do so. The confirmed plan provided for the sale of assets of the Debtor to New Piper — a third-party entity owned by Teledyne and DS&P. The bankruptcy court had nothing to do with that non-party's capital stock, its ownership or control. Finally, not only did the confirmation proceedings, in which Kaiser did not participate, *not* involve in any way, much less adjudicate, *any* of Kaiser's state court claims, but those claims, as the Eleventh Circuit properly recognized in the opinion below, could not have been raised because

"Kaiser did not have an adequate procedural vehicle to bring its state court claims, or their equivalent, in the Chapter 11 case" in any event. Pet. App. A at 33a.

These facts serve to demonstrate why Teledyne's "question presented" misstates the issue, why there is no circuit conflict and why the principles of *res judicata* are simply inapplicable in this case.

REASONS FOR DENYING THE WRIT

Teledyne seeks review here upon two faulty premises: first, that there is some inconsistency among the circuits in the application of *res judicata* principles in bankruptcy cases; and second, that this Court needs to define "the contours" of claim preclusion in bankruptcy, and should do so here. Neither is so.

To the contrary, the writ should be *denied*: (1) because the Eleventh Circuit's opinion applied clearly enunciated, non-controversial principles of *res judicata* in the bankruptcy context here, *consistently* with the law in the other circuits; and (2) because, even if this Court were to consider it beneficial to speak out on *res judicata* principles in bankruptcy cases (for which no particular need is demonstrated in the Petition), this case would provide a decidedly inappropriate vehicle for such pronouncement.

A. There is No Inter-Circuit Conflict

Teledyne concedes, as it must, the nationwide *consistency* in recognition of the elements of *res judicata*. *See* Pet. at 6 ("The courts of appeals agree on the basic elements of *res judicata*.") (citations omitted).

Equally non-controversial, and supported by the decisions of this Court, is the recognition that *res judicata* principles apply not only to bankruptcy proceedings generally, *see Katchen v. Landy*, 382 U.S. 323, 334 (1966) ("The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts."), but also apply specifically to bankruptcy plan confirmation orders. *See Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 654 (1945) ("The order confirming the plan of reorganization is res judicata.") (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940)); *see also Stoll v. Gottlieb*, 305 U.S. 165 (1938) (holding that because the question of subject-matter jurisdiction was actually raised, litigated and determined in the bankruptcy court's confirmation of the plan of reorganization, that determination was *res judicata*).

The Eleventh Circuit's adherence to these generally recognized and consistently applied *res judicata* principles here alone defeats the Petition, in which Teledyne can logically complain only of an alleged misapplication of those principles — a complaint rarely deemed a sufficient basis to grant a petition for writ of certiorari. *See* Sup. Ct. R. 10.

But there was neither any misapplication here nor any inconsistency with the application of these same principles in other circuits. Indeed, the only "inconsistency" to which the Petition points is purportedly with the Third Circuit Court of Appeals's decision in *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999).[2] The Petition

2. Interestingly, *CoreStates* relies heavily upon Eleventh Circuit precedent in *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544 (11th Cir. 1990). *See CoreStates*, 176 F.3d at 194, 201-2.

argues that *CoreStates* decided the same question of federal law posed here, with the "opposite" result. Pet. at 10. Kaiser strongly disagrees.

Wholly apart from the fact that the *CoreStates* opinion emphasizes that its holding was "narrow" and "largely fact-bound," *CoreStates*, 176 F.3d at 191, 203, and was reached "because of the coincidence of several unusual circumstances," *id.* at 206, those facts and circumstances were dramatically different from the facts here. The single most important difference was that the claimant, CoreStates, was a creditor in the bankruptcy proceedings which *actually litigated an objection to plan confirmation*, in the course of which the precise claim later presented in the subsequent action was addressed. *Id.* at 192. The court concluded that "CoreStates functionally raised the Subordination Agreement [the subject of the subsequent lawsuit] in its objection [to plan confirmation]." *Id.* at 203. Kaiser did not even litigate a claim — any claim — in the Piper confirmation hearing.

The court in *CoreStates* further recognized that "[c]laim preclusion does not apply unless the present claim was or could have been raised in the prior proceeding," *id.* at 203 (citation omitted) — the same principle recognized by the Eleventh Circuit here. *See* Pet. App. A at 12a (citing *Justice Oaks II*, 898 F.2d at 1550). The *CoreStates* court concluded in that case "that there was no reason CoreStates could not have brought its current claim before the Bankruptcy Judge." *CoreStates*, 176 F.3d at 203. The Eleventh Circuit concluded here, however, that "[e]ven if we were to decide that all of the prerequisites to res judicata were met, Teledyne still would not be entitled to relief because the claim in Kaiser's state court action were not brought, and more importantly could *not* have been brought, in the bankruptcy proceeding." Pet. App. A at 29a (emphasis added).

Since Kaiser was neither a creditor nor an equity security holder of Piper, Kaiser did not vote — and could not have voted — on the plan, did not announce an appearance on the record at the confirmation proceeding, did not file an objection to confirmation, and did not seek relief of any kind or participate in any material way at the confirmation proceeding. At most, and like many others who filled the courtroom during the confirmation proceeding, Kaiser was a mere passive observer at the confirmation proceeding. Moreover, Kaiser had no direct interest in the outcome of the confirmation proceeding. As neither a creditor nor an equity security holder of Piper, Kaiser had no direct claim against or interest in its Chapter 11 estate. Thus, Teledyne's argument that "CoreStates had no better opportunity to bring its claim before the bankruptcy court than Kaiser did in this case," Pet. at 10, flatly ignores two distinguishing facts which lead to the differing conclusions in this case and *CoreStates*: (1) CoreStates, unlike Kaiser, was a creditor; and (2) CoreStates, unlike Kaiser, unquestionably had the ability to and did in fact raise formal objections to the reorganization plan in the bankruptcy proceeding that involved its underlying claim.

It could not be more clear, then, that the Third and Eleventh Circuit Courts in these two cases consistently applied the same principles, reaching different conclusions only because the facts so required. These are *consistent*, not inconsistent holdings.

Teledyne's reliance on *CoreStates* also fails to take into account the same court's subsequent decision, just last year, in *Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330 (3d Cir. 2000), which discusses, in considerable detail, its ruling in *CoreStates* and explains:

> [*CoreStates*] illustrates, in what we recognized to be a somewhat unique factual and procedural

> setting, that one does not get a second bite at the proverbial apple simply because the first bite was taken in a bankruptcy case. * * * Similarly, we note that care must be taken in determining whether the first bite was actually taken such that it would preclude the second. [*CoreStates*] does not stand for the proposition that nondebtors must assert all potential claims in a bankruptcy case or be forever barred. . . . Rather, [*CoreStates*] helps us frame the key question that the parties agree we should ask whenever the affirmative defense of claim preclusion is raised on the basis of a prior bankruptcy confirmation order, namely, whether the later claim *arises from the same cause of action* as a claim that was actually asserted or interposed in the earlier bankruptcy case and resolved in the confirmation order. Here, we have concluded that it does not.

Id. at 339 (citation and footnote omitted; emphasis in original).

There was no claim asserted in the Piper bankruptcy case that arises from the same cause of action as that asserted in Kaiser's state court action, as the Eleventh Circuit recognized, in an opinion based upon the very same principles applied in the Third Circuit.[3]

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3. Teledyne's reliance on *Iannochino v. Rodolakis (In re Iannochino)*, 242 F.3d 36 (1st Cir. 2001) and *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251 (4th Cir. 1997) is equally misplaced. Both cases involved post-bankruptcy lawsuits by creditors which actually asserted objections or initiated adversary proceedings in the bankruptcy proceeding that involved the same claims underlying the subsequent lawsuits, necessitating claim preclusion under the same principles applied by the Eleventh Circuit here.

B. This Case Would Provide a Decidedly Inappropriate Vehicle for the Court to Speak Out on *Res Judicata* Issues in Bankruptcy

It was not the Eleventh Circuit that erred in deciding that *res judicata* principles are not implicated here, but the two lower courts which, while properly confirming Kaiser's right to sue in state court for its damages remedies, nonetheless sought to rely upon *res judicata* to bar Kaiser's claim for a separate, constructive trust *remedy* based upon the same causes of action otherwise not barred. What really occurred in the lower courts, *under the guise of Teledyne's res judiciata argument*, was the entry of an improper injunction by the bankruptcy and district court against a party seeking a remedy that the bankruptcy court apparently considered inconsistent with the policies of the Bankruptcy Code.

While it may well have been within the bankruptcy court's power to have enjoined prosecution of Kaiser's alternative request for constructive trust relief under the right showing, that could only have occurred upon a proper determination, *after trial and based upon the evidence*, that the granting of such relief would be required to avert irreparable harm to those sought to be protected by the Confirmation Order. However, no such trial occurred, no facts were before the court, and the injunction was entered based solely on the pleadings, relying exclusively on *res judicata*.

Had a trial actually been conducted, it would have been hotly contested. The confirmed plan and the historical record give strong support to what would have been Kaiser's argument, that there could be no irreparable harm to creditors

because the outcome of the constructive trust claim (i.e., who owned what shares of New Piper) was immaterial to the ultimately confirmed plan. Notably, during the plan confirmation process, no evidence was admitted concerning the creditworthiness or business acumen of the New Piper shareholders, and the plan itself contained no limitations or prohibitions that would have prevented others from obtaining all or part of their shares (through transfers, enforcement of collateral liens or otherwise).

The irony of all of this collateral litigation, through all of its iterations and proceedings through the federal court system long after the Piper bankruptcy, is that the ultimate granting of constructive trust relief in the state court action, which is still pending, can affect *no one but Teledyne and DS&P*, the parties whose conduct wronged Kaiser. The creditors of Piper have long since been paid, and the provisions of the plan were long ago completely carried out. The only thing to be gained by Teledyne in pursuing its appeal here would be absolution in advance from liability for a wrong which has not yet been adjudicated and the deprivation of Kaiser's right to trial. No other public or private interests are involved.

Thus, while there is no reason of which Kaiser is aware from the case law why this Court should wish to address the issue of *res judicata* arising from a final bankruptcy court judgment confirming a plan of reorganization, in the absence of inter-circuit conflict and where the general principles are well recognized nationwide, and consistently applied, it would certainly be less than ideal to do so in a case such as this, where none of the post-bankruptcy claims were actually litigated in bankruptcy and where the doctrine of *res judicata* does not even come into play.

CONCLUSION

The petition for writ of certiorari, therefore, should be denied.

Respectfully submitted,

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